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No. 399

In the Supreme Court of the United States

OCTOBER TERM, 1942

PENN DAIRIES, INC., AND THE UNITED STATES OF AMERICA, APPELLANTS

v.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

In the Supreme Court of Pennsylvania

EASTERN DISTRICT

January Term 1942, No. 173. (Appeal of Penn Dairies, Inc., in which the United States has intervened)

January Term 1942, No. 180. (Appeal of the United States)

PENN DAIRIES, INC., APPELLANT, THE UNITED STATES OF AMERICA, INTERVENOR-APPELLANT

v.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, the United States of America and Penn Dairies, Inc., herewith submit their statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause. The date of the judgment entered by the Supreme Court of Pennsylvania is May 25, 1942. The petition for appeal is dated July 17, 1942. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Section 237 (a) of the Judicial Code as

amended by the Act of February 13, 1925. The following cases are believed to sustain the jurisdiction of the Supreme Court: *Standard Oil Co. of Calif.* v. *Johnson, Treasurer of the State of Calif.*, No. 1125, decided June 1, 1942; *United States* v. *Klein*, 303 U. S. 276; *Nebbia* v. *New York*, 291 U. S. 502; *Johnson* v. *Maryland*, 254 U. S. 51.

STATE STATUTE INVOLVED

The statute of the Commonwealth of Pennsylvania which was held to be valid but which the appellants contended was unconstitutional and in conflict with the laws of the United States is the Milk Control Law of Pennsylvania, Act of April 28, 1937, P. L. 417 (31 PS Sec. 700j, 101 et seq.), particularly Section 802 of said Act, which is as follows:

> SECTION 802. *Wholesale and retail prices.*—The commission shall fix, by official order (except as hereinafter provided in this section), the minimum wholesale and retail prices, and may fix, by official order, the maximum wholesale and retail prices, to be charged for milk sold within any milk marketing area of the Commonwealth, wheresoever produced, including milk sold by:
>
> (1) Milk dealers to other milk dealers;
>
> (2) Milk dealers to consumers;
>
> (3) Milk dealers to stores, either for consumption on the premises or resale to consumers;

(4) Stores to consumers, except for consumption on the premises where sold.

Nothing herein contained shall be construed to empower the commission to fix the price at which milk may be sold by any milk dealer or producer to consumers for consumption on the premises of such milk dealer or producer.

The fixing of minimum wholesale or retail prices for skimmed milk, condensed or concentrated whole or skimmed milk, bulk cream handled between milk dealers other than stores, and ice cream mix, shall be discretionary with the commission.

And also Section 404 (10) of said Act, which is as follows:

SECTION 404. *Grounds for refusal, suspension or revocation.*—The commission shall grant a license to an applicant complying with the provisions of this act and the rules, regulations, and orders issued by the commission pursuant thereto. The commission may decline to grant a license to an applicant, or may suspend, revoke, or refuse to transfer a license already granted to a milk dealer, or may prohibit a milk dealer exempted from the license requirements of this act from continuing to operate as a milk dealer, after determination by the commission that the dealer:

* * * * * *

(10) Has violated any of the provisions of this act, or any of the rules, regulations, or orders of the commission, or any stipula-

tion entered into between the said dealer and the commission in the course of any proceeding before the commission;.

THE NATURE OF THE CASE

In the Fall of 1940 the United States established a large military encampment on lands belonging to the Commonwealth of Pennsylvania at Indiantown Gap, Dauphin County, Pennsylvania. Thereafter, the Purchasing and Contracting Officer of the Quartermaster of the United States Army at Indiantown Gap solicited competitive bids to supply milk to the post during the months of March, April, May, and June 1941 (R. 48a–52a).

The Milk Control Commission of Pennsylvania had therefore promulgated the general order fixing minimum retail prices of fluid milk (R. 30a–43a). Upon the issuance of the invitations to bid the Commission advised local dealers that its order was applicable to the sale of milk to the United States and that the schedules of rates in its general order fixed the minimum prices below which no Pennsylvania milk dealer could sell milk to the United States (R. 10a–13a). Penn Dairies, Inc., a Pennsylvania corporation having its principal office in the City of Lancaster, Pennsylvania, was the lowest bidder (R. 70a). It was awarded the contract which called for the delivery of 540,000 half-pint bottles and 135,000 quart bottles at contract prices of $0.0215 per half-pint bottle and $0.079 per quart bottle, which prices were lower

than the minimum prescribed by the Milk Commission (R. 53a).

Acting under Section 404 of the Milk Control Law the Commission, after a citation and hearing, refused to renew the milk dealer's license of Penn Dairies, Inc., for the year beginning May 1, 1941. The refusal was based solely on the fact that Penn Dairies had contracted to sell and had sold milk to the United States at prices below the minimum prices fixed by the Commission (R. 54a). Penn Dairies appealed to the Court of Common Pleas of Lancaster County, Pennsylvania, from the order refusing the renewal of its license[1] (R. 56a–60a).

In the action in the Court of Common Pleas the United States filed a Suggestion of Interest (R. 69a–74a), was allowed to intervene (R. 83a) and has participated in the litigation continuously since its intervention. On July 25, 1941, the Court of Common Pleas affirmed the order of the Commission (R. 100a). On March 23, 1942, the Superior Court of Pennsylvania affirmed the judgment of the Court of Common Pleas. On May 25, 1942, the Supreme Court of Pennsylvania affirmed the judgment of the Superior Court.

[1] With that appeal and each subsequent appeal there has been a *supersedeas*. By reason of the orders of *supersedeas* the Commission, acting under Section 406 of the Milk Control Law, has successively issued conditional licenses to appellant for the years beginning May 1, 1941, and May 1, 1942, which licenses are by law automatically cancelled five days after the termination of the litigation favorably to the

THE FEDERAL QUESTIONS AND THE RULINGS THEREON

The appellants contended below

(1) That if the price control features of the Milk Control Law and the Orders of the Milk Control Commission issued thereunder should be construed to apply to milk purchased by the United States then the Act is unconstitutional in that it constitutes a direct interference with the sovereign right of the United States to contract for the purchase of supplies for the Army upon such terms as it sees fit, free from all State interference or control as to the terms and substance of the contract and that the Act constitutes an unconstitutional interference with Penn Dairies' correlative constitutional right to deal with the United States; and

(2) That the Act and the Orders issued pursuant thereto effectually precluded real competitive bidding and therefore conflict with the Federal statutes which require Army supplies to be purchased on competitive bids.

The first question was raised before the Milk Control Commission in the Answer of Penn Dairies, Inc., to the citation of the Commission (R. 14a–15a) and in the Petition of Penn Dairies before the Court of Common Pleas (R. 58a). Both questions were raised in the Court of Common Pleas by the Suggestion filed by the United States (R. 72a–74a) and in the Superior Court of Pennsylvania and in the Supreme Court of

Pennsylvania by assignment of error, by brief and by argument.

The issues so raised were squarely passed upon by each of the lower courts and were decided adversely to the contention of the appellants by each of the lower tribunals (Op. of Milk Comm., R. 54a, Op. of Ct. of Common Pl as, R. 85a–94a, 97a–100a). The Superior Court stated that the questions before it were:

> (1) Whether the Milk Control Law authorizes the Milk Control Commission to fix minimum prices for the sale of milk to the United States; (2) Whether there was, on February 15, 1941, any order of the Commission which, when properly construed, applied to such sales; and (3) If these questions are answered in the affirmative, whether the law, and the order issued pursuant to it, cast an unconstitutional burden upon the Government.

After answering the first two questions in the affirmative, the Superior Court in deciding the third question said:

> * * * And we hold that since the prices fixed are in no way discriminatory and are not such a burden as to interfere with the functions of the federal government, they are valid. As Mr. Justice Holmes said, "* * * when the Government comes into a State to purchase, I do not perceive why it should be entitled to stand differently from any other purchaser." In the absence

> of prohibitive federal legislation, we are unwilling to disturb an enactment so well designed to provide for a local need.
>
> Nor do we think the law interferes with the Government's policy of competitive bidding * * *. The Milk Control Law contravenes neither the language of the statutes nor any of the above-stated purposes. It does no more than to put all bidders on an equal footing with regard to the minimum price and as we have already pointed out, its primary purpose is to assure *responsibility* with all that the word implies.

The Supreme Court of Pennsylvania affirmed, saying:

> It would be idle repetition to restate the facts and the law of the case. We therefore affirm the judgments on the comprehensive opinion of Judge Kenworthey, reported in — Pa. Sup. Ct. —.

THE QUESTION IS ONE OF SUBSTANCE

The constitutional questions decided by the Supreme Court of Pennsylvania are substantial and important. The United States, particularly at the present time, maintains and operates large numbers of camps, stations, posts, and military fields of various character. These posts, wherever located in the continental United States, are necessarily within the territorial limits of the various States, and the supplies of food required for the maintenance of the forces stationed at such posts, especially such products as fresh milk, must be ob-

tained from the area contiguous to the posts. Legislation seeking to control the minimum prices which distributors must charge for fluid milk is in effect in a number of States,[2] and in at least three States other than Pennsylvania the state boards have held that sales to the United States come within the intendment of the statutes.[3] Both from the standpoint of the United States and from that of the distributors it is of the utmost importance to learn if the distributors must comply with the minimum prices fixed by State Boards in bidding upon Federal supply contracts.

The state statute as construed by the Milk Commission and approved by the Supreme Court of Pennsylvania constitutes a deliberate attempt to regulate federal functions beyond the reach of valid state authority. As disclosed by the bulletin issued by the Milk Control Commission on Febru-

[2] Alabama, No. 164, Laws of 1939; Connecticut, Gen. Stat. Supp. 1935, Sec. 801 (c); Florida, Comp. Gen. Laws Anno. 1940 Sup., Sec. 3219 (50); Georgia, Code of Ga. Ann. Title 42, Sec. 552; Maine, Laws of 1935, c. 13; Montana, revised Code Ann. 1939 Supp., Sec. 2640.7; New Hampshire, Laws of 1937, c. 107; Oregon Laws of 1939, c. 197; Rhode Island, Laws of 1940, c. 899; Vermont, Laws of 1937, No. 99, Virginia, 1934 Laws, c. 357.

[3] Substantially the same questions are involved in the case of *Pacific Coast Dairy, Inc.*, v. *Department of Agriculture of California*, 123 Pac. (2d) 440, now pending in the Supreme Court of the United States on appeal from the Supreme Court of California. See also *Milk Control Board* v. *Gosselin's Dairy, Inc.*, 301 Mass. 174; *Patterson Milk & Cream Co.* v. *Milk Control Board*, 118 N. J. L. 383.

ary 4, 1941 (R. 10a–13a), specific attention was called to the invitation of the United States for bids on the supplies of milk here involved. Certain information was given to the dealers and the Commission expressly stated in respect of the proposed purchase (R. 12a):

> Any purchases or sales of milk made or offers to buy or sell milk below the prescribed minimum prices of the effective general orders of this Commission are construed as violations of the Milk Control Law.

It is clear, therefore, that the statute as construed and applied by the Milk Commission and by the courts of Pennsylvania was intended to regulate and control the prices which the United States would be compelled to pay for fluid milk.

The constitutional infirmity of the statute as construed seems clear. The States are without power to prescribe the conditions on which private citizens may contract with the Federal Government. Cf. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 867; *Crandall* v. *Nevada*, 6 Wall. 35, 44; *Arizona* v. *California*, 283 U. S. 423, 451–452; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 156; *Stewart Co.* v. *Sadracula*, 309 U. S. 94, 103–104. And the particular conditions prescribed by the statute and order would seem to conflict with the Federal enactments requiring competitive bidding in the letting of contracts for furnishing of supplies. R. S. 3709 (41 U. S. C.

5), Act of July 5, 1884, c. 217, 22 Stat. 108, 109; Act of June 30, 1902, c. 1328, 32 Stat. 507, 514 (10 U. S. C. 1200–1201).

The cases relied upon by the Pennsylvania courts are not controlling. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and *Graves* v. *O'Keefe*, 306 U. S. 466, are cases involving taxes which were imposed by state authority and which were to be borne by individuals. The legal incidence of the tax was upon the individuals and the tax could be either absorbed by the taxpayer or passed on. The burden which the United States might be compelled to bear in the future was properly determined to be so indirect as to constitute no impairment of federal functions. In *Alabama* v. *King & Boozer*, 314 U. S. 1, the direct legal incidence of the tax was placed upon King & Boozer and it was only the government's voluntary assumption of such taxes by contract that resulted in the burden of the tax ultimately resting upon the United States. In none of these cases was there any interference with the policy in operation of the federal competitive bidding statutes. The legal and practical incidence of the price regulation here involved, however, is necessarily on the buyer and seller alike and the regulation directly interferes with the enforcement of the competitive bidding statutes.

There are appended hereto copies of the opinions of the Supreme Court of Pennsylvania, of

the Superior Court of Pennsylvania, of the Court of Common Pleas of Lancaster County, Pennsylvania, and of the Milk Control Commission.

THE UNITED STATES OF AMERICA,
By CHARLES FAHY,
Charles Fahy,
Solicitor General.

GERALD A. GLEESON,
Gerald A. Gleeson,
United States Attorney.

PENN DAIRIES, INC.,
By HARRIS C. ARNOLD,
Harris C. Arnold,
Attorney.

OPINION OF THE COURT

(Filed May 25, 1942)

Per Curiam:

These appeals are from the judgments of the Superior Court, which affirmed an order of the Court of Common Pleas of Lancaster County. We have carefully considered each question raised and find that they were all correctly and ably disposed of by the learned Superior Court. It would be idle repetition to restate the facts and law of the case. We therefore affirm the judgments on the comprehensive opinion of Judge Kenworthy, reported in — Pa. Superior Ct. —.

Judgments affirmed.

OPINION OF THE SUPERIOR COURT

(Filed March 3, 1942)

Opinion by Kenworthey, J.

The questions are: (1) Whether the Milk Control Law[1] authorizes the Milk Control Commission to fix minimum prices for the sale of milk to the United States; (2) whether there was, on February 15, 1941, any order of the Commission which, when properly construed, applied to such sales; and (3) if these questions are answered in the affirmative, whether the law, and the order issued pursuant to it, cast an unconstitutional burden upon the government.

The facts are virtually undisputed. On February 1, 1941, the government purchasing officer, at Indiantown Gap, sent to various milk dealers, including defendant,[2] invitations to bid on the milk requirements for the Army reservation located there. The requirements called for the delivery of 135,000 one-quart bottles and 540,000 half-pint bottles between March 1st and June 30,

[1] Act of April 28, 1937, P. L. 417, 31 PS 700j.

[2] Penn Dairies, Inc., for convenience, will be referred to as "defendant" in spite of the fact that Section 904 provides: "The appeal provided by this article from action of the Commission shall be by petition against the Commission, officially as defendant." This case was started by a citation against Penn Dairies, Inc., in which it was the defendant.

1941. On February 4, 1941, the Milk Control Commission promulgated a notice "To All Milk Dealers Interested in Submitting Bids to Furnish Milk to the United States Government at Indiantown Gap", one of which went to defendant. Accompanying the notice, were copies of the orders which the Commission deemed applicable. The notice indicated the minimum price to be $0.095 per bottle for the milk sold in quarts and $0.025 for that sold in half-pints, and the notice closed with a warning that any sales at prices below the prescribed minimums would be construed as violations of the law. The notice, except for the tabulation of specifications, is printed in the margin.[3] On February 15, 1941, the bids were opened and the contract awarded defendant as the lowest bidder. Defendant's bid for both quantities—$0.079 for the quarts and $0.0215 for the half-pints—was below the minimums."

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[3] "The quantities for the above items are listed as the estimated quantities required for each month during the period from March 1, 1941, to June 30, 1941, inclusive.

"For your information and guidance, we are enclosing herewith a copy of our Official General Order A-14, applicable to Area No. 11, the Statewide Milk Marketing Area, in which area Indiantown Gap, Pennsylvania, is located, and direct your attention to sub-paragraph (b), Section 4, of said Order, setting forth the minimum wholesale prices to be charged by or paid to milk dealers for Grade A Milk, either raw or pasteurized; for Grade B milk, either raw or pasteurized, not exceeding 4.0% butterfat content; and for Plain Buttermilk, sold in bottles or other containers, in said Area No. 11.

"The Commission construes the Government Facility at Indiantown Gap, Pennsylvania, as a training camp or res-

On March 5, 1941, the Commission issued a citation to defendant to show cause why its application for a milk dealer's license for the year May 1, 1941 to and including April 30, 1942, should not

ervation, and as such, where milk is required in half-pint bottles or half-pint fibre containers, would be entitled to the special wholesale half-pint school prices of said Order No. A-14.

"Where milk dealers propose to furnish Grade A milk, pasteurized Grade B milk, not exceeding 4.0% butterfat content, or Plain Buttermilk, meeting Federal Specifications, the following minimum unit prices should be considered in the preparation of their bids:

Product	Unit prices	
	Quarts	Half-pints
Grade A milk either raw or pasteurized	$0.115	$0.035*
Grade B milk, either raw or pasteurized, not exceeding 4.0% butterfat content	.095	.0275*
Plain buttermilk	.07	

"The Commission suggests that milk dealers acquaint themselves with Federal Specifications for milk, particularly C-M-381B.

"Any purchases or sales of milk made or offers to buy or sell milk at prices below the prescribed minimum prices of effective Official General Orders of this Commission are construed as violations of the Milk Control Law.

"The Milk Control Commission expects compliance with its orders, rules, and regulations, and will appreciate your cooperation in this matter.

*Includes service charges for ice, straws, or special boxes. If these services are not rendered, these prices may be reduced by $0.0025 per half-pint.

"Commonwealth of Pennsylvania
Milk Control Commission,
Edwin H. Ridgway,
Secretary."

be refused. The sole ground alleged was the aforesaid violation of its Order. Defendant, by answer, raised the questions which are now before this court. The Commission, having refused the license in an order which, on appeal, was sustained by the Court of Common Pleas, defendant took this appeal.

First: Does the Milk Control Law authorize the Commission to fix minimum prices for milk sold to the government?

The Act, Section 802, provides: "The Commission shall fix . . . . the minimum wholesale and retail prices . . . . to be charged for milk sold within any milk marketing area of the Commonwealth wheresoever produced, *including* milk sold by: 1. milk dealers to other milk dealers; 2. milk dealers to consumers; 3. milk dealers to stores . . . .; 4. stores to consumers . . . ." [Italics supplied.] Conceding, arguendo, that the government is not included in any of the enumerated classes, the question is whether "including" is a word of limitation—whether it means "including only". It is sometimes thus used; it is perhaps more often used as a word of extension or enlargement.[1] "To arrive at the real meaning, it is always necessary to take a broad general view of the act,

[1] *American Surety Co.* v. *Marotta*, 287 U. S. 513, 53 S. Ct. 260; *Cannon* v. *Nicholas*, 80 Fed. (2d) 934 (C. C. A. 10th); *Weller & Weller* v. *The Grange Mutual Casualty Insurance Co.*, 105 Pa. Superio. Ct. 547, 161 A. 615; *McGlathery's Estate*, 311 Pa. 351, 166 A. 886.

so as to get an exact conception of its aim, scope and object." *Keating* v. *White, et al.*, 141 Pa. Superior Ct. 495, 504, 15 A. (2d) 396; *Statutory Construction Act* of May 28, 1937, P. L. 1019, 46 PS 551, 554, 563. The purpose of the law (Sec. 101) is to regulate and control the milk industry "for the protection of the public health and welfare and for the prevention of fraud". Section 801 provides: "The Commission shall base all prices upon all conditions affecting the milk industry in each milk marketing area, including the amount necessary to yield a reasonable return to the producer and to the milk dealer." As Mr. Justice Stern said in *Rieck-McJunkin Dairy Company* v. *Milk Control Commission*, 341 Pa. 153, 157, 18 A. (2d) 868: "The main purpose of the Milk Control Law [is] to insure a sufficient supply of wholesome milk, which cannot be accomplished unless, as the preamble of the act recites, 'the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk,' . . . ." Although the prices to all classes of producers or dealers need not be the same, it is apparent that, in order to carry out the purpose of the law, the price fixing power must extend to *all* sales of milk by both producers and dealers. If these purposes are carried out, the legislation will inure to the benefit of the government as a part of a community within the Commonwealth, as well as to

other consumers. On the other hand, if the policy of the law is not carried out as to the largest single buyer, the purpose may be frustrated. The Supreme Court has held that the provisions of the law apply to a governmental subdivision of this Commonwealth. *Zeuger Milk Co. v. Pittsburgh School District*, 334 Pa. 277, 5 A. (2d) 885. We hold that the Legislature intended the Commission to have the power to regulate the prices of sales to the United States, provided it is not unconstitutional.[5] And, in view of this conclusion, it is not necessary to consider whether the government is a "consumer" as defined in the act.

Second. Had the Commission, on February 15, 1941, issued any order fixing the minimum price of sales to the government for consumption at an army camp?

The Commission contends that the price was fixed by Official General Order No. A-6, as amended by A-14.[6] The order provided wholesale prices for sales by "milk dealers to other milk dealers and to stores for resale; and to bakeries,

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[5] The Statutory Construction Act of May 28, 1937, P. L. 1019, Article IV, Sec. 52, 46 PS 552, provides that in construing an act, the courts shall presume: "(3) That the Legislature does not intend to violate the Constitution of the United States or of this Commonwealth."

[6] "(B) Minimum Wholesale Prices. Milk dealers to other milk dealers and to stores for resale; and to bakeries,

hotels, restaurants, hospitals and *institutions*. . . ." special provision for sales to schools, fixing $0.0275 (Italics supplied.) The price fixed for Grade B milk not exceeding 4% butterfat, is $0.095 for quarts and $0.025 for half-pints. But there is a for half-pints. It is to be noted that, for the sales of half-pints, the Commission allowed the lowest price on the schedule. Defendant admits the Indiantown Gap Military Reservation is an institution.[7] Defendant argues that, because of the unprecedented size of the contract—it was conceded to have been the largest single order for milk ever given in this Commonwealth—the cost to it of servicing the contract would be considerably reduced, that it could make a reasonable profit and

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hotels, restaurants, hospitals, and institutions for consumption on the premises:

Product	Unit price		
	Quart	Pint	Half-pint
Grade "A" Milk	$0.115	$0.06	$0.035
Grade "B" Milk:			
Exceeding 4.0% B. F.	.095	.06	.035
Not exceeding 4.0% B. F.	.085	.05	.035
Grade "B" Milk to Schools, not exceeding 4.0% B. F.			.0275
Cream Buttermilk, Chocolate Milk and other flavored Milk or Milk Drink containing more than 0.5% Butterfat.	Same as Grade "B" Milk Exceeding 4.0% Butterfat.		
Skim Milk	.06		
Buttermilk—Plain	.07	.05	.03
	(One Gallon, Single Container, Single Delivery, $0.25)"		

[7] The citation averred: "6. Indiantown Gap, a United States Military Reservation, is an institution of the United States for military training," and this averment was admitted in the corresponding paragraph of the answer.

maintain the price to the producers with a lower return, and that it is, therefore, unreasonable to suppose that the Commission intended the prices in Order A–14 to apply. The principal difficulty with this contention, as we see it, is that the evidence offered does not support it. Defendant offered, by stipulation,* figures to show "its average bottle breakage and losses where milk is served under ordinary conditions" as compared to losses from similar causes under the contract, there being an alleged difference of 2%. In the same manner, it offered evidence to show that "under ordinary circumstances delivery of the same quantity of milk would require a large number of trucks and drivers" and that, under the contract, there was a saving of delivery cost on each bottle of $0.0005. But there is nothing to indicate what the "ordinary circumstances" or the "ordinary conditions" were. Obviously, the difference in the cost of servicing a thousand customers is materially larger than the cost of servicing one. But the cost

* The stipulation was in two parts. It provided that paragraphs 1, 2, and 3, which have no application to the present question, "shall be treated as admitted facts." It then provided: "It is further agreed that the statements in the following paragraphs shall be received in evidence as competent testimony. . . ." Although the statements in these subsequent paragraphs were not contradicted, they were obviously intended to have less weight than those in the first three and we consider that they were open to analysis and that we are not bound by the inferences defendant would draw from them.

of servicing five or ten customers may not be. The schedule of prices fixed by the Commission for this contract, being the lowest possible, the cost must be compared, if the comparison is to be used as valid argument, with the cost of servicing other *large* customers, such as hotels, restaurants, hospitals and other large institutions. If the figure offered by defendant for comparison was weighted by the cost of servicing small, individual customers, the figure is of no value whatever. And there is no indication of what, exactly, the comparison means. We hold General Order A–1, as amended by A–14, covered the sale to the government.

Third. Does the Order impose an unconstitutional burden upon the government?

The extent to which, under our dual system of government, the states may burden the operations of the federal government, has long been the subject of controversy. The Constitution does not expressly deal with it. From *McCulloch* v. *Maryland*,[9] decided in 1824, down to *James* v. *Dravo Construction Co.*,[10] decided in 1937, Chief Justice Marshall's dictum that the power to tax is the power to destroy was the prevailing doctrine. Under it, any law which imposed a demonstrable burden on the government was held to be unconstitutional.[11] But, as Mr. Justice Holmes pointed

[9] 4 Wheat. 316.

[10] 302 U. S. 134.

[11] See statement of Mr. Justice Roberts (dissenting) in *James* v. *Dravo Construction Co.*, supra, at p. 161.

out in his dissent in the *Panhandle Oil Case*,[12] "In those days it was not recognized, as it is today, that most of the distinctions of the law are distinctions of degree," and, "The power to tax is not the power to destroy while this court sits."[13] And the decisions in *Graves* v. *O'Keefe*[14] and *Alabama* v. *King & Boozer*[15] have swept the doctrine into oblivion. In its place, a new test has arisen. "Since two governments have authority within the same territory, neither, through its power to tax, can be allowed to cripple the operations of the other. Therefore, state and federal governments must avoid exactions which *discriminate* against each other or *obviously interfere* with one another's operations."[16] [Italics supplied.] Or, as Mr. Justice Roberts put it in his dissent in *James* v. *Dravo*, *supra*, a tax is valid if it bears upon an independent contractor, does not discriminate, and is

[12] *Panhandle Oil Company* v. *Miss. ex rel. Knox*, 277 U. S. 218, 223.

[13] In his concurring opinion in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, Mr. Justice Frankfurter characterized the dictum as a "seductive cliché."

[14] 306 U. S. 466.

[15] — U. S. —, 62 S. Ct. 43. In this case a contractor erected an army camp under a cost-plus contract and the court upheld a tax on the sale of materials which was, therefore, ultimately paid by the United States. In a companion case, a "use" tax was also upheld. *Curry* v. *United States*, — U. S. —, 62 S. Ct. 48.

[16] Mr. Justice Frankfurter in *Graves* v. *New York ex rel. O'Keefe*, supra, at page 488.

not so burdensome as seriously to *interfere* with governmental functions."

The Milk Control Law is not directed against the Indiantown Gap Reservation. If the objects of the law are realized, the Reservation will benefit in common with the community in general. Conversely, as already pointed out, if dealers are to be free to ignore the law in dealing with the Reservation, the whole plan will suffer proportionately. The Reservation can buy milk as others buy milk and at any price which competition may fix, not lower than the established minimum. There is no burden upon it which does not likewise fall upon all users of milk, including institutions of this Commonwealth. See *Zeiger Milk Co.* v. *Pittsburgh School District, supra.* No attempt is made in the law or in the Order of the Board to give any order or direction to the Reservation or its Officers. The incidence of the law is upon dealers of milk. Although enforcement of the law against such dealers affects the price of milk to the Reservation as to others, yet that result is in its nature incidental. See *Milk Control Board* v. *Gosselin's Dairy Co.*, 301 Mass. 174, 16 N. E. (2d) 641, 643. Other statutes regulating the quality and providing for the inspection of milk are of similar effect.

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[17] He also points out (p. 172) in this dissenting opinion that the Solicitor General (now Mr. Justice Reed) filed a Brief advocating that "A non-discriminating state tax is to be judged not by the 'burden' it imposes, but by the extent of its 'interference' with the functioning of government."

All safety and health laws, of which the Wage Law [18] is an example, increase prices. And since the *King & Boozer Case, supra,* such laws are not deemed invalid, even though the increased cost is directly passed on to the government.

That the test of constitutionality in cases involving police regulations is the same as in tax cases seems clear and is apparently conceded on all sides. *Baltimore & Annapolis R. R.* v. *Lichtenberg,* 176 Md. 383, 4 A. (2d) 734, *appeal dismissed,* 308 U. S. 525, 60 S. Ct. 297; also *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94. A tax on materials, to be added to cost and passed on to the government, imposes a burden no less direct than that imposed by a statute which fixes the minimum price to be charged by an independent contractor selling milk to the government. The government is, by the law, compelled to pay a demonstrably higher price in both instances. And we hold that, since the prices fixed are in no way discriminatory and are not such a burden as to interfere with the functioning of the federal government, they are valid. As Mr. Justice Holmes said, ". . . when the government comes into a state to purchase, I do not perceive why it should be entitled to stand

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Although Mr. Justice Roberts did not subscribe to the new test, it is interesting to note that he did not dissent in either *Graves* v. *New York ex rel. O'Keefe,* nor in the *King & Boozer* case.

[18] Act of 1937, May 27, P. L. 917, 43 PS 331.

differently from any other purchaser."[19] In the absence of prohibitive federal legislation, we are unwilling to disturb an enactment so well designed to provide for a local need.

Nor do we think the law interferes with the government's policy of competitive bidding. *Spahn v. Stewart*, 268 Ky. 97, 103 S. W. (2d) 651. The applicable statutes (U. S. Revised Statutes, Sec. 3709, 41 U. S. C. A. Sec. 5; 10 U. S. C. A. Secs. 1200 and 1201) provide merely that contracts for the purchase of supplies for the government shall be made after public notice and shall be awarded to the "lowest responsible bidder for the best and most suitable article." As pointed out in *United States v. Brookridge Farm, Inc.*, 111 F. (2d) 461, 463 (C. C. A. 10th), "The purpose of these statutes and regulations is to give all persons equal right to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition." The Milk Control Law contravenes neither the language of the statutes nor any of the above stated purposes. It does no more than put all bidders on an equal footing with regard to the minimum price and as we have already pointed out, its primary purpose is to assure *responsibility* with all that the word implies.

[19] *Panhandle Oil Case*, at p. 224.

In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant. In No. 3 October Term, 1942, the appeal of the United States, which intervened in the court below in the case represented by the appeal to No. 311 October Term, 1941, is dismissed.

Rhodes, J., dissents.

DISSENTING OPINION

(Filed March 3, 1942)

Rhodes, J.:

I would reverse the order of the court below. Penn Dairies, Inc., the appellant, at the invitation of the Quartermaster of the United States Army, submitted a bid for furnishing bottled milk to the army at Indiantown Gap, Pa., for the months of March, April, and May, 1941. As low bidder appellant was awarded the contract to supply by daily deliveries, during such period, 540,000 half-pint bottles, and 135,000 quart bottles of milk. The only ground for this action was the alleged violation of the commission's minimum price schedules in its general order No. A–14. There is a stipulation as to facts and evidence. Paragraphs 1, 2, and 3 of the stipulation relate to admitted facts, and paragraphs 4, 5, 6, 7, 8, and 9, state what shall be considered as evidence of respondent (appellant here). In my opinion, this distinction is not especially material in this proceeding. There was no contradictory evidence. It seems too manifest to admit of any argument that if the commission's minimum price order applies in this case there could have been, as a matter of fact, no real competitive bidding. That was re-

quired in this case by acts of Congress. 41 U. S. C. A. § 5; 10 U. S. C. A. §§ 1191–1225. It does not appear to have been within any exception to the requirement. Paragraphs 8 and 9 of the stipulation read:

> "8. The profit which respondent [appellant here] would realize from the sale of the quantities covered by said contract, if sold at prices fixed by said order, would be a profit materially in excess of any margin of profit necessary to maintain stability in the milk industry.
>
> "9. The margin of profit which the respondent [appellant here] will realize under the said contract is adequate for respondent's purposes and to maintain stability in the industry."

A minimum price materially in excess of that necessary to afford stability to the milk industry and to give a reasonable margin of profit to the dealer would certainly eliminate competitive bidding. No one will believe that any responsible dealer who was capable of complying with the contract would bid, as a practical matter, above the fixed minimum. All responsible bids would be at the fixed minimum, and consequently the effect of the commission's minimum price order would be to prevent the free competition which the market would warrant for such a quantity of milk.

For the disposition of this appeal, I do not consider it necessary to decide the constitutional questions which have been raised, or determine the power of the commission as applied to the facts in this case. It is sufficient to refer to the conclusion, which I think is erroneous, in the majority opinion that the commission, on February 15, 1941, had issued an order which applied to this sale to the United States Government. I agree with appellant's argument that the commission's general order contains no schedule which can properly be applied to this contract; that such a contract was not contemplated when the general order was formulated; and that the effort of the commission to apply schedules intended for widely different situations is arbitrary, unreasonable, and unjustified. The stipulation entered into between the parties recited in considerable detail the saving to appellant in performing its contract with the United States Government made possible by the quantity of milk to be delivered.[1] The majority opinion attacks this stipulation on the ground that it is indefinite, and finds difficulty in interpreting the terms, "ordinary circumstances", and "ordinary conditions". I think the meaning is clear for the purposes of this controversy; and what was meant does not appear to be disputed by the commission. The terms were intended to designate the usual course of appel-

[1] See stipulated and admitted facts (28a, 29a).

lant's business with reference to all its other sales of milk. It was agreed in the stipulation that this was "the largest quantity of milk to be delivered by a single seller to a single purchaser, or for delivery in quantity lots, known to the respondent or to the commission." The suggestion in the majority opinion that under the circumstances a more useful comparison could have been made with "the cost of servicing other *large* consumers, such as hotels, restaurants, hospitals and other large institutions" is not convincing, and I think it is inapplicable. No milk contract of this magnitude has been known in Pennsylvania before. Appellant therefore drew a comparison with all of the remainder of its business, the subject matter of the commission's ordinary exercise of its authority, to demonstrate the conclusion which the commission in the stipulation conceded thus: "The profit which respondent would realize from the sale of the quantities covered by said contract, if sold at prices fixed by said order, would be a profit materially in excess of any margin of profit necessary to maintain stability in the milk industry." No producer would benefit from such excessive profits to the dealer. In my opinion, the commission's general order No. A–14 does not cover this contract,[2] and was not intended to

[2] This sale and purchase of milk by the Government of the United States for consumption by the army is not within the commission's order No. A–14 establishing minimum wholesale prices "to bakeries, hotels, restaurants, hospitals, and institutions for consumption on the premises," and to schools.

apply to the situation involved in this case, and the proper construction of that order makes it inapplicable to the facts which have been stipulated.

The Commission's argument that if its order did not apply to the present transaction because the transaction was not described in the order, then appellant should have applied to the commission as to applicable prices raises a matter which is not here involved. If there was no applicable schedule, there was no violation by appellant of the order as charged.

I would therefore reverse the order of the court below in sustaining the commission's refusal of the application for renewal of appellant's license.

OPINION OF THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA

Schaeffer, P. J.

The question for decision by the court is whether a milk dealer of Pennsylvania selling milk to the United States Government for use at a Military Reservation, located at Indiantown Gap, Pennsylvania, is subject to the minimum price orders of the Milk Control Commission of Pennsylvania in respect to such sales.

On March 5, 1941 the Milk Control Commission of Pennsylvania issued a citation to Penn Dairies, Inc., of Lancaster, Pennsylvania, to show cause why its application for a license to do business as a milk dealer for the year beginning May 1, 1941 and ending April 30, 1942, should not be refused, because it offered to sell and sold milk at less than the minimum prices as fixed by the Milk Control Commission of Pennsylvania. At a hearing held on March 18, 1941, Penn Dairies, Inc., admitted selling milk to the United States Government at less than the minimum prices, being at the rate of $0.079 instead of $0.095 for fresh pasteurized milk in quart bottles, and at $0.0215 instead of $0.025 for half pints, contrary to subdivision B of Section 4 of Official General Order A–6, as amended by Official General Order A–14 of the Commission. On March

25, 1941 the Milk Control Commission of Pennsylvania entered an order refusing the application of the Penn Dairies, Inc., for a milk dealer's license. An appeal was taken to this court and a supersedeas was granted, thereby permitting the appellant to furnish milk to the Indiantown Gap Military Reservation under the contract until final disposition of this appeal. On June 9, 1941 the United States, upon petition and a suggestion of interest in the pending litigation, was allowed to intervene.

It is conceded as a general legal proposition that a State cannot regulate an instrumentality of the United States Government if it constitutes a direct burden upon the Government and interferes with the performance of its functions. Should it be invoked and applied in all cases, especially where public policy justifies its waiver? In *Buckstaff Bath House Co.* v. *McKinley*, 308 U. S. 358, 60 S. Ct. 279, it is said "That petitioner is subject to the Social Security Act [of Arkansas] is extremely relevant to the solution of the problem at hand. For that Act laid the foundation for a cooperative endeavor between the states and the nation to meet a grave emergency problem. As pointed out by this Court in *Steward Machine Co.* v. *Davis*, *supra*, 301 U. S. page 588, 57 S. Ct. page 891; 81 L. Ed. 1279, 109 A. L. R. 1293, that Act was an attempt to find a method by which the states and the federal government could 'work together to a

common end'." In the Pennsylvania Milk Control Act of April 28, 1937, P. L. 417, the Legislature provided in Section 311: "The commission is hereby vested with authority to confer with legally constituted authorities of other states and of the United States with respect to uniform milk control within the states and as between states, to conduct joint investigations, to exchange information, hold joint hearings and issue joint, complementary or concurrent orders, and to enter into a compact or compacts for such uniform milk control, subject to such Federal approval as may be authorized or required by law." Subdivision (i) of Section 10 of the Act of Congress of May 12, 1933, c. 25, Title I, 48 Stat. 37, as amended and reenacted by the Act of June 3, 1937, c. 296, Section 1, 7 U. S. C. A. Section 610 (i), shows that the state and federal price control laws relating to milk and other agricultural commodities are intended to be as uniform and all-inclusive as possible. This subdivision provides: "The Secretary of Agriculture upon request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is

authorized to cooperate with such authorities." "Agricultural commodities" as used in these Acts mean, inter alia, "milk and its products." 7 U. S. C. A. Section 611.

The Commission contends that "one who contracts with the United States for the performance of services or the supply of materials does not thereby obtain immunity from state regulations." It is admitted that employees or officers of the United States are free from state regulations that interfere with the functions of government. *Ohio* v. *Thomas,* 173 U. S. 276, 19 S. Ct. 453. However, this immunity generally is not applicable to private persons or corporations who enter into contracts with the United States Government to furnish materials or to render services in an independent capacity. In *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 46 S. Ct. 172 (1926), Mr. Justice Stone referred to a party claiming immunity, "who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government or an impairment of the efficiency of its agencies in any substantial way." In *James Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 60 S. Ct. 431 (1940), the

Supreme Court said: "While, of course, in a sense the contract is the means by which the United States secures the construction of its post office, certainly the contractor in this independent operation does not share any governmental immunity." In *Buckstaff Bath House Co.* v. *McKinley,* 308 U. S. 358, 60 S. Ct. 279 (1939) supra, it is stated: "The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. *Fidelity & Deposit Co.* v. *Pennsylvania,* 240 U. S. 319." In *Baltimore and Annapolis Railroad Co.* v. *Lichtenberg, United States, Intervener,* 176 Md. 383, 4 Atl. (2d) 734 (1939), it was decided that the Public Service Commission of Maryland had power to require a certificate from a contractor engaged solely in the carrying of passengers for the Federal Government on a public project. It is said: "The court is of opinion that there is no such interference as is prohibited to the State by the United States Constitution. Only the use of the roads of the State by an independent contractor is dealt with. There is no interference with any governmental instrumentality. A private instrumentality is availed of by contract, its use of the roads for gain to be turned to the service of the Government. And, as already stated, the court sees no foundation for holding that the Government may, for its greater convenience or for the sake of economy, relieve the contractor of the obligation to conform to the law.

Such an independent agency, engaged in its independent trade, must, in our opinion, be considered unchangeably subject to the law in its operation whether it contracts for its services with the Government or with promoters of private enterprises. See *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 58 S. Ct. 208." The Supreme Court said: "The appeal is dismissed for want of a substantial Federal question."

The United States Government contends that the Commission seeks "to regulate or control the activities of the Federal Government," and that "the individual States are without constitutional authority to apply their several police power laws to the United States." The United States relies upon the immunity as defined by Mr. Chief Justice Marshall in 1819 in *McCulloch* v. *Maryland*, 4 Wheat. 316, 436, involving the right of the State to tax a bank of the United States. He said: "The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." In *Johnson* v. *State of Maryland*, 254 U. S. 51 (1920), Mr. Justice Holmes delivered the opinion of the court. There the question related to the necessity of a state license to operate a government motor truck on the highways by an employe of the United States Post Office Department. He quoted from *Osborn* v. *Bank of the United States*, 9 Wheat.

738, as follows: "'Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.' In more recent days the principle was applied when the governor of a soldiers' home was convicted for disregard of a state law concerning the use of oleomargarine, while furnishing it to the inmates of the home as part of their rations. It was said that the federal officer was not 'subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority'." Later in 1928 in a dissenting opinion by Mr. Justice Holmes, *Panhandle Oil Co.* v. *State of Mississippi*, 277 U. S. 218, 48 S. Ct. 451, joined in by Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice McReynolds, he said: "To come down more closely to the question before us, when the Government comes into a State to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the State that makes the business possible is just as necessary an element in

the cost of production as labor or coal. . . . . It does not appear that the Government would have refused to pay a price that included the tax, if demanded, but if the Government has refused it would not have exonerated the seller. *Pierce Oil Corporation* v. *Hopkins*, 264 U. S. 137, 139, 44 S. Ct. 251." He referred to the Coast Guard or the officials of the Veterans' Hospital as instrumentalities of government, but said: "The question of interference with Government, I repeat, is one of reasonableness and degree and it seems to me that the interference in this case is too remote." *Metcalf* v. *Mitchell*, 269 U. S. 514, 46 S. Ct. 172. Mr. Justice McReynolds in his dissenting opinion said: "The doctrine of immunity is well established, but it ought not to be extended beyond the reasons which underlie it. . . . . The federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise."

The attitude of Mr. Chief Justice Hughes on the question at issue in this case is set forth aptly in an article by Robert H. Jackson, as Attorney General of the United States, in the American Bar Association Journal of July, 1941, Volume 27, page 410, as follows: "Apart from the field of taxation, however, the Chief Justice has gone very far in sustaining state regulatory statutes, particularly those which have been assailed as being in conflict with

federal power. He has always appeared careful to concede the broad sweep of federal authority which could supersede the state statute if Congress should so desire; but even where Congress has legislated in the field, he has generally upheld the state statute if it was not in conflict with the federal legislation. State regulatory statutes generally have received hospitable consideration at his hands. His opinion in the historic Minnesota Mortgage Moratorium case is illustrative of his willingness to respect the action of the legislature except where there is a clear constitutional prohibition." In *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, supra, Mr. Chief Justice Hughes delivered the majority opinion of the court. He said referring to taxation by either the State or Federal Government: "As 'neither government may destroy the other or curtail in any substantial manner the exercise of its powers,' we said that the limitation upon the taxing power of each, so far as it affects the other, 'must receive a practical construction which permits both to function with the minimum of interference each with the other. . . .'" He also said: "The contention ultimately rests upon the point that the tax increases the cost to the government of the service rendered by the taxpayer. But this is not necessarily so. . . . If the payment of the state taxes imposed on the property and operations of the taxpayer 'affects the federal government at all, it at most gives rise to a burden

which is consequential and remote and not to one that is necessary, immediate or direct'." Mr. Justice Roberts in his dissenting and minority opinion held that a sales tax on commodities sold to the Government, though laid upon the seller, is invalid as directly burdening the Government's transaction. In referring to the principle of Federal immunity he said: "The question is not one of quantum, not one of the weight of the burden, but one of power. . . . Where the principle *applies* it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute." (Italics supplied.)

It seems that such difference of opinion arises not as to the fundamental law but rather as to its application to the facts and circumstances of each case. In the construction of the Milk Control Act of Pennsylvania by Mr. Justice Roberts in *Milk Control Board of Pennsylvania* v. *Eisenberg Farm Products*, 306 U. S. 346, 59 S. Ct. 528 (1939), he said: "But in matters requiring diversity of treatment according to the special requirements of local conditions the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run

counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable. These principles have guided judicial decisions for more than a century. Clearly they not only are inevitable corollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. The difficulty arises not in their statement or in a ready assent to their propriety, but in their *application.*" [Italics supplied.]

In *Paterson Milk & Cream Co., Inc.*, v. *Milk Control Board et al.*, decided by the Supreme Court of New Jersey in 1937, 192 Atl. 838, it is said: "The second point made is that sales made to the United States government by the prosecutor, at prices below those fixed by the Milk Control Board, were not subject to the Milk Control Act of this state. . . . It was settled in *Trinity-farm Construction Company* v. *Grosjean*, 291 U. S. 466, . . . that where the United States deals with a corporation the corporation with which it deals is subject to state regulations. Hence, it would seem that the prosecutor was obliged to obey the reasonable regulations of the Milk Control Board of this state, and the fact that he dealt with the United States government is no justifica-

tion for his disregard of the reasonable regulations of this state." In *Milk Control Board* v. *Gosselin's Dairy, Inc.*, 16 N. E. 2d 641, the Supreme Judicial Court of Massachusetts in 1938 said: "It is conceded of course, fully and ungrudgingly, that a State cannot attempt to regulate an instrumentality of the United States or impose burdens upon it which interfere with its operation and efficiency. On the other hand we apprehend that an institution of the Federal government situated within a State cannot wholly escape every consequence arising from a fact so pervasive and insistent as is the fact of location in the midst of a civilized community whose orderly existence and continuance are derived from and supported by another sovereignty of general powers. . . . There is no discrimination against the hospital. It can buy milk as others buy milk and at any price which competition may fix not lower than the established minimum. No burden upon it can result, even indirectly, which does not likewise fall upon all users of milk, including institutions of this Commonwealth of comparable nature. No attempt is made in the law, or in the order of the board, or in this litigation to control or to give any order or direction to the veterans' hospital or to any of its officers. The incidence of the law is upon dealers in milk. Although enforcement of the law against such dealers may in fact affect the price of milk to the hospital as well as to others,

yet that result is in its nature incidental and collateral rather than immediate and direct. . . . . We incline to the view that a dealer furnishing milk in this Commonwealth to the veterans' hospital remains bound by the Massachusetts milk control law." This court in *Commonwealth* v. *Wayne L. Rohrer*, 45 Lanc. L. R. 553 (1937) reached a similar conclusion.

It is contended also that "the Milk Control Law does not purport and should not be construed to authorize the Commission to fix prices for sales of milk to the United States." Article VIII, Section 802 of the Milk Control Law of April 28, 1937, P. L. 417, authorizes the Commission to fix prices for milk sold, inter alia, by milk dealers to consumers. According to Article I, Section 103 of the Milk Control Law, " 'Consumers' means any person, other than a milk dealer, who purchases milk for consumption or use." It is then provided in the same section that " 'person' includes an individual, corporation, association, partnership, limited partnership, or other unincorporated enterprise owned by two or more individuals." In *Baker et al.* v. *Kirschnek et al.*, 317 Pa. 225 (1935), it was decided that the Commonwealth is not a person within the meaning of special Act incorporating the Borough of Media which provides that it shall not be lawful for any person or persons to sell intoxicating liquors within the limits of the borough. The court said: "In construing a statute, words are to be

taken in their ordinary sense, unless, from a consideration of the whole act, it appears that a different meaning was intended." In *Stanley* v. *Schwalby*, 147 U. S. 508, 517, 13 S. Ct. 418 (1893), it was held that the United States was a "person" and could set up the bar of the state statute of limitations that ran in favor of persons. Mr. Chief Justice Fuller said: "Of course, the United States were not bound by the laws of the State, yet the word 'person' in the statute would include them as a body politic and corporate." In a recent case decided in 1941, *United States* v. *Cooper Corporation et al.*, 61 S. Ct. 742, which is applicable to the case at bar in the interpretation of the statute in question, Mr. Justice Roberts in delivering the opinion of the court said: "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law. . . . . Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense; and if doubts remain, resolve them in the

light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction."

Whether or not the United States is a person, or a consumer of milk, within the meaning and purpose of the Milk Control Act depends largely upon the purpose or public policy intended to be served by that Act. While it is not the province of the court to determine what constitutes such policy in the field of public health, nevertheless, its purpose, as set forth in the preamble of the Act is recognized in *Rieck-McJunkin Dairy Company* v. *Milk Control Commission of Pennsylvania,* 341 Pa. 153 (1941), by Mr. Justice Stern: "The main purpose of the Milk Control Law [is] to insure a sufficient supply of wholesome milk, which cannot be accomplished unless, as the preamble of the act recites, 'the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk'." In *United States* v. *Rock Royal Co-op. Inc., et al.,* 307 U. S. 533, 59 S. Ct. 993, Mr. Justice Reed said: "The power of a state to fix the price of milk has been adjudicated by this Court. . . . . So essential is it for health that the consumer has been willing to forego unrestricted competition from low cost territory to be assured of the producer's compliance with sanitary requirements." With this purpose and policy in mind the State Legislature intended

that the word "consumer" as used in the Milk Control Act with respect to the sale of milk, be all-inclusive. The Act expressly and clearly excepts only a milk dealer. The Statutory Construction Act of Pennsylvania, May 28, 1937, P. L. 1019, Article IV, Section 54, provides: "Exceptions expressed in a law shall be construed to exclude all others." By excluding all others except a milk dealer both provisions of said Section 103, relating to consumer and person, are given effect in carrying out the paramount purpose of the Milk Control Act in accordance with Section 63 of the same Act. In *Keating* v. *White et al.*, 141 Pa. Superior Ct. 495, 504 (1940), quoting from *New York Life Insurance Co.* v. *Guaranty Corporation*, 321 Pa. 359, it is said: "To arrive at the real meaning, it is always necessary to take a broad general view of the act, so as to get an exact conception of its aim, scope and object. . . . . The true meaning is to be found, not merely from the words of the act, but from the cause and necessity of its being made, from a comparison of its several parts and from extraneous circumstances." Such construction of the statute is not analogous to the situation presented in the case of *Green et al.* v. *Milk Control Commission et al.*, 340 Pa. 1 (1940), where it was said: "The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistak-

able. . . . . With the principle stated before us, turning to the law embodying the powers of the Milk Control Commission, we find nothing said about milk shipped to dealers on consignment. . . . . We are asked by the Commonwealth to interpolate these words into the Act. This we cannot do without violating the important principle to which we have adverted." The case at bar involves the interpretation of words expressed in the statute rather than supplying words which are wanting in the statute.

It is argued that the Commission's price-fixing authority cannot be applied to government purchases constitutionally, because it would conflict with Federal statutes requiring competitive bidding and price competition. In Title 10 of the United States Code Annotated (July 5, 1884, c. 217, 23 Stat. 109; Aug. 24, 1912, c. 391, Section 3, 37 Stat. 591), it is provided in Section 1200 that in the letting of contracts for quartermaster supplies for the Army, "the award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids". However, it is not absolutely required under all conditions and in all instances as shown by Section 1201, Title 10 of the United States Code Annotated (Mar. 2, 1901, c. 803, 31 Stat. 905), which provides as follows: "Except in cases of emergency or where it is impracticable to secure competition, or in cases

otherwise provided for, the purchase of all supplies for the use of the various departments, and posts of the Army and of the branches of the Army service shall only be made after advertisement; and said supplies shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered." In *Good Roads Machinery Co. of New England* v. *United States*, 19 Fed. Supp. 652 (1937), it was decided that purchases of material and equipment for a civil works project by an administrator or officer of the United States were made under "public exigency" requiring immediate delivery, and hence advertising for competitive bids was not essential under Section 3709 of the Revised Statutes of the United States (41 U. S. C. A., Section 5).

In a written notice by the Pennsylvania Milk Control Commission to all milk dealers interested in submitting bids to the United States Government at Indiantown Gap, Pennsylvania, the Commission fixed the minimum milk prices to be considered by the bidders in the preparation of their bids with respect to the grades of milk therein mentioned. This order and notice of the Commission did not prevent competitive bidding, after due advertisement, but fixed only the minimum prices to be submitted by the milk dealers of Pennsylvania. Furthermore, the Act of Congress

above cited expressly provides that advertising and competitive bidding are not required "where it is impracticable to secure competition, or in cases otherwise provided for." In *Lukens Steel Co. et al.* v. *Perkins et al.*, 107 Fed. Repr. (2d) 627, the United States Court of Appeals for the District of Columbia in 1939 decided that where a determination of the Secretary of Labor established minimum wages in a particular locality for purposes of public contracts and provided that such minimum wages should apply to all contracts awarded subject to the Act of Congress, it was binding on persons submitting bids for government contracts and on government agencies. This case was affirmed by the United States Supreme Court in 310 U. S. 113, 60 S. Ct. 869, but on other grounds.

The fact that the Commonwealth of Pennsylvania is the owner of the Military Reservation of 12,638¼ acres at Indiantown Gap, Pennsylvania, and permits the United States to use it for its troops, does not affect the fundamental legal question involved in this case, but it indicates a spirit of cooperation in our present national emergency.

Irrespective of the juridical phase of this case in relation to the United States Government and its increasing instrumentalities, it is evident that a general compliance with the Milk Control Act in question is in harmony with and promotes both the

Federal and State policy to provide pure and wholesome milk not only for our citizens but also for our soldiers.

The conclusion is reached that the appellant as a milk dealer of Pennsylvania is subject to the Milk Control Act of Pennsylvania, and, accordingly, must submit its bids for the sale of milk to the United States Government at the Indiantown Gap Reservation on the basis of minimum prices as promulgated by order of the Commission. Such conclusion is in accord with the decisions of the Supreme Courts of New Jersey and Massachusetts, supra.

XII FINAL ORDER

And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to the Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained.

By the Court:

OLIVER S. SCHAEFFER,
P. J.

FINDINGS OF FACT AND ORDER OF THE MILK COMMISSION

On March 5, 1941, a citation was directed against the respondent, Penn Dairies, Inc., requiring it to show cause why its application for a milk dealer's license for the year May 1, 1941 to April 30, 1942, inclusive, should not be refused for offering to sell and selling milk at less than minimum prices fixed by the Milk Control Commission. The alleged offer and sale were to the purchasing and contracting officer at Indiantown Gap, Pennsylvania, a United States Military Reservation. The respondent filed an answer to the citation, admitting the material allegations of the citation, but claiming that the offer and sale were not in violation of the Milk Control Law for two reasons: (1) that the offer and sale having been made to the United States, the respondent did not have to observe the orders of the Pennsylvania Milk Control Commission, and (2) that the order was not applicable to this transaction because the minimum price was too high. A hearing was held before the Milk Control Commission on March 18, 1941, at which time certain testimony was received.

From the pleadings and testimony before it, the Milk Control Commission makes the following findings of fact:

1. The defendant, Penn Dairies, Inc., is a corporation organized under the laws of the Common-

wealth of Pennsylvania, doing business as a milk dealer in several parts of the Commonwealth of Pennsylvania and having its principal place of business in Lancaster, Pennsylvania, at 572 North Queen Street, and at 623 Second Street.

2. The defendant, Penn Dairies, Inc., has applied to the Milk Control Commission of Pennsylvania for a milk dealer's license for the year May 1, 1941, to April 30, 1942, inclusive.

3. On or about February 1, 1941, the purchasing and contracting officer of the Quartermaster at Indiantown Gap, Pennsylvania, sent to the defendant Penn Dairies, Inc., at Lancaster, Pennsylvania, a standard government form of invitation for bids, Form No. 30, Invitation No. QM 517–41–14, accompanied by standard government form of bid No. 31, and standard government form of continuance, Schedule No. 36.

4. Said standard form No. 30 as issued by the purchasing and contracting officer read as follows:

"STANDARD GOVERNMENT FORM OF INVITATION FOR BIDS

(Supply Contract)
Invitation No. QM. 517–41–14
February 1, 1941

"Sealed bids, in triplicate will be received in this office until the date and hour named in the accompanying schedules and then publicly opened, for furnishing the materials and supplies called for therein.

"Bids must be submitted upon the Standard Government Form of Bid, (Standard Form No. 31) and in accordance with the Standard Government Instructions to Bidders (Standard Form No. 22) and any special instructions supplementary thereto.

"Envelopes containing bids must be sealed and marked on the upper left-hand corner with the name and address of the bidder and the date and hour of opening and addressed to the purchasing agency named below:

"Purchasing and Contracting Officer,
Office of the Quartermaster,
Indiantown Gap, Pennsylvania.

"Marked: Bid for Milk, Buttermilk and Ice Cream. March 1 to June 30, 1941, requirements.

"To be opened: 10:00 a. m. Eastern Standard Time, February 15, 1941.

"Special purchase conditions, attached to said invitation for bids, provided, in part, as follows:

1. General: Bids are invited for supplies as specified in this invitation, all or any part thereof, to be delivered as specified, all transportations, switching or drayage charges to be prepaid by the contractor and supplies to be subject to final inspection and acceptance at destination.

"23. * * *

"Milk, Bread & Ice Cream: Deliveries of Milk, Bread and Ice Cream will be made daily to Military Organization Barracks,

Indiantown Gap, Pa., on days called for by the Quartermaster, or his authorized representative, and at such time as directed. It is understood and agreed that the milk bottles and all containers shall remain the property of the contractors and every possible precaution will be maintained to preserve same in the original state, but in the event of damage to these articles while in the possession of the Government, the Government will not be held responsible for such damages, as the purchase in question is a purchase of contents only."

5. Thereafter and prior to 10:00 a. m., Eastern Standard Time, February 15, 1941, Penn Dairies, Inc., in accordance with said invitation for bids, offered by writing delivered to said purchasing and contracting officer, to sell to the purchasing and contracting officer in the office of the Quartermaster, Indiantown Gap, Pennsylvania, 135,000 one quart bottles of fresh pasteurized milk at $0.079 per bottle, and 540,000 half pint bottles of fresh pasteurized milk at $0.0215 per bottle. The schedule for bid and the defendant's bid described 135,000 quarts of fresh milk and the 540,000 half pints of fresh milk as items Nos. 1 and 3 respectively, in said bid, the respective descriptions in said invitation and bid reading as follows:

"Item No. 1—Milk, Fresh, Grade A Pasteurized, 1 Qt. Bottles, W/Sanitary Protective Type Caps. Type 11 C–M–381B 135,000 Btl.

"Item No. 3—Milk, Fresh, Grade A. Pasteurized, ½ Pt. Bottles, W/Sanitary Protective Type Caps. Type 11 C–M–381 B 540,000 Btl."

6. Indiantown Gap, a United States Military Reservation, is an institution of the United States for military training, situate in the northwestern part of Lebanon County between state highway route No. 443 and state highway route No. 343, in the State of Pennsylvania, and is situate in Area No. 11 of Pennsylvania, as designated by the Milk Control Commission of Pennsylvania, being the State-Wide Milk Marketing Area.

7. Minimum wholesale prices to be charged by milk dealers for milk sold in bottles or other containers in Area No. 11, the State-Wide Milk Marketing Area, are established by Official General Order No. A–6 of the Milk Control Commission, as amended by Official General Order No. A–14, in Section 4, Subdivision (b).

8. Grade A pasteurized milk, as described in the aforesaid invitation to bid, is equivalent to Grade B milk as described in Official General Orders Nos. A–6 and A–14 of the Milk Control Commission and other price-fixing orders of the Commission. The part of Section 4 (b) of Official General Order No. A–14, amending and superseding that portion of Official General Order No. A–6 that applies to the present case reads as follows:

"(b) Minimum Wholesale Prices. Milk dealers to other milk dealers and to stores

for resale; and to bakeries, hotels, restaurants, hospitals and institutons for consumption on the premises:

Product	Unit Price		
	Quart	Pint	Half-Pint
Grade "A" Milk			
Grade "B" Milk			
	$0.115	$0.06	$0.035
Exceeding 4% B. F.	.105	.06	.035
Not exceeding 4% B. F.	.095	.05	.055
Grade "B" Milk to Schools			
Not exceeding 4% B. F.			.0275

* * * * *

The above price to schools include service charges for ice, straws, or special boxes. If these services are not rendered, the above prices may be reduced by $0.0025 per half-pint."

9. The Milk Control Commission has treated Indiantown Gap Military Reservation as an educational institution or school thereby allowing the benefit of an interpretation of such official general orders Nos. A-6 and A-14 favorable to the application of the lowest minimum prices possible for milk sold to Indiantown Gap Military Reservation, and announced to all known interested parties, including the defendant, Penn Dairies, Inc., that the minimum prices to be charged by milk dealers for fresh pasteurized milk in half pints sold to the purchasing and contracting officer at Indiantown Gap shall be $0.025 per half pint of milk where Grade B milk as described in said official general orders is fur-

nished and there are no special services of ice, straws or special boxes.

10. On February 15, 1941, at 10:00 o'clock a. m., Eastern Standard Time, the aforesaid bid of the defendant Penn Dairies, Inc., as well as other bids submitted, were opened by the purchasing and contracting officer in the office of the Quartermaster, Indiantown Gap, Pennsylvania, and thereafter the offer of the defendant, Penn Dairies, Inc., to sell 135,000 quarts of fresh pasteurized milk and 540,-half pints of fresh pasteurized milk, as hereinbefore stated, was accepted and a contract thus entered into.

11. The defendant, Penn Dairies, Inc., in accordance with the said offer to sell and contract for, has delivered milk to several mess halls and other places at said Indiantown Gap Military Reservation.

12. The milk so delivered was received from milk producers in and near Lancaster County, Pennsylvania, by defendant, Penn Dairies, Inc., at its place of business at 623 Second Street, Lancaster, Pennsylvania, where it was weighed, tested, processed, bottled, capped, crated and loaded on trucks of the defendant for delivery by employees of the defendant to said Indiantown Gap Military Reservation.

13. The prices at which the defendant, Penn Dairies, Inc., offered to sell and did sell milk to the purchasing and contracting officer at the office of the Quartermaster, Indiantown Gap, Pennsyl-

vania, were $0.079 instead of $0.095 for quarts of fresh pasteurized milk in quart bottles, and $0.0215 instead of $0.025 for half pints, as respectively provided in subdivision B of Section 4 of Official General Order A–6, as amended by Official General Order A–14, and therefore said offer to sell and the sales thereof are in violation of Section 807 of the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, and the application for Penn Dairies, Inc., for a milk dealer's license for the year May 1, 1941, to and including April 30, 1942, should be refused under Section 404 (10) of the Milk Control Law.

14. The Milk Control Commission finds that the testimony on behalf of the respondent does not show that Official General Order No. A–6, as amended by Official General Order No. A–14, is inapplicable to the facts of this case or invalid.

15. The respondent, Penn Dairies, Inc., did not prior to the issuance of this citation and has not since then filed with the Milk Control Commission any request for any amendment or revision to Official General Order No. A–6, as amended by Official General Order No. A–14. The Milk Control Commission has not received any such request from any other milk dealer affected by said orders.

Discussion

The first legal proposition submitted to the Commission by the respondent is that because it sells milk under the contract in question to an

instrumentality of the United States, the orders of the Milk Control Commission are not applicable. This contention cannot be sustained.

In the case of *Commonwealth* v. *Rohrer*, 37 D. & C. 410, 421, in an opinion by Judge Schaeffer, the Court of Quarter Sessions of Lancaster County held that a milk dealer who sells milk to a United States Veterans Hospital must do so at the minimum prices prescribed by the Commission. The facts in that case were almost identical in the present case before the Commission. There appear to be only two other cases directly in point. These are *Paterson Milk and Cream Company, Inc.*, v. *Milk Control Board*, 118 N. J. L. 383, 192 Atl. 838, and *Milk Control Board* v. *Gosselin's Dairy, Inc.*, 16 N. E. (2d) 641, 644 (Mass. 1938). The law is so well discussed in the opinion by Judge Schaeffer that no further discussion will be made here. It is sufficient to say that the regulations of the Milk Control Commission are an exercise of the police power to which the respondent milk dealer is subject. There is no attempt by the Commission to regulate the actions of United States officers upon United States territory.

The second legal defense that the respondent interposes is that the order of the Milk Control Commission in this particular case is not reasonable.

The respondent milk dealer has not requested a hearing pursuant to Article VIII of the Milk

Control Law for the purpose of revising Official General Order No. A-6, as amended by Official General Order No. A-14. The present hearing is one concerning only the Milk Control Commission and the respondent dealer. A hearing to revise or amend a price order is one in which all interested parties are entitled to due notice. It would be manifestly unfair for the Milk Control Commission to say without allowing other interested parties to be heard, that this particular order is unreasonably high. The respondent cannot disregard an order of the Milk Control Commission and attempt to bring out facts that show unreasonableness of the order in a proceeding of this kind. This can only be done by an appeal from the price order itself or by petition to have a price order amended or revised.

Those milk dealers who rely upon the validity of a price order and govern their bids and sales accordingly would be the victims of uncertainty if the respondent were able to disregard the orders of the Commission and acquire a contract at other than lawful prices by reason of alleged unreasonableness of the orders.

The Superior Court of Pennsylvania so held in the case of *Commonwealth* v. *Ziegler-Dairy Company*, 139 Pa. Superior Ct. 224, 11 Atl. (2d) 669, in which President Judge Keller discussed this matter fully.

ORDER OF THE MILK CONTROL COMMISSION

And now, this 25th day of March, A. D. 1941, the application of Penn Dairies, Inc., Lancaster, Pennsylvania, the respondent herein, for a milk dealer's license for the year May 1, 1941, to April 30, 1942, inclusive, is refused for the reasons above stated.

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

JOHN M. MCKEE,
Chairman,

JOHN J. SNYDER,
Member.

U. S. GOVERNMENT PRINTING OFFICE: 1942